Supreme Court, U.S.
FILED

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98 371 AUG 31 1998

No. _____ OFFICE OF THE CLERK

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

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D.R. HILL, Warden et al., *Petitioners*,

v.

TOUFIC BADIH NADDI, *Respondent*.

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is a court precluded from considering psychiatric evidence in determining whether waiver of the constitutional right to counsel is knowing and voluntary?

2. Is the retrial of a criminal defendant necessarily compelled in every instance where the defendant's right to self-representation has been erroneously denied?

## LIST OF PARTIES

D. R. Hill, Warden of Tehachapi State Prison, and Daniel E. Lungren, Attorney General of California are the Petitioners in this Petition for Writ of Certiorari.

The United States Court of Appeals for the Ninth Circuit issued an unpublished opinion on June 9, 1998, which is the subject of this request for review.

Toufic Badih Naddi, a state inmate serving a sentence of life without the possibility of parole for the murders of his wife, her mother and father, as well as his wife's cousin and her sister's husband, is the Respondent and real-party-in-interest in the underlying proceeding.

## TABLE OF CONTENTS


| | Page |
|---|---|
| CITATIONS OF OPINIONS AND ORDERS | 1 |
| STATEMENT OF JURISDICTION | 2 |
| CONSTITUTIONS, STATUTES OR REGULATIONS | 2 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING THE WRIT | 6 |
| CONCLUSION | 13 |

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Arizona v. Fulminante, 499 U.S. 279 (1991) | 10 |
| Faretta v. California, 422 U.S. 806 (1975) | 5, 10 |
| Godinez v. Moran, 509 U.S. 389 (1993) | 6, 7 |
| Johnson v. Zerbst, 304 U.S. 458 (1938) | 9, 11 |
| McKaskle v. Wiggins, 465 U.S. 168 (1984) | 10 |
| United States v. Arlt, 41 F.3d 516 (9th Cir. 1994) | 10 |
| United States v. Cash, 47 F.3d 1083 (11th Cir. 1995) | 8 |
| Von Moltke v. Gillon, 332 U.S. 708 (1948) | 9 |
| Wilkins v. Bowersox, 145 F.3d 1006 (8th Cir. 1998) | 8, 9 |
| Wilkins v. Bowersox, 833 F.Supp. 1496 (W.D. Mo. 1996) | 9 |

**IN THE SUPREME COURT OF THE UNITED STATES**

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## CITATIONS OF OPINIONS AND ORDERS

People v. Naddi, Case No. D013123, an unpublished opinion filed January 7, 1994, by the California Court of Appeal, Fourth Appellate District, Division One, affirming the judgment of conviction.

Naddi v. D. R. Hill, Case No. 95-CV-00022 J (AJB), an unpublished order, filed on April 29, 1996, by the United States District Court for the Southern District of California denying Naddi's petition for writ of habeas corpus as to all but one of the contentions raised by him and granting the writ of habeas corpus on the basis of Naddi's contention he was denied his right to self-representation.

Naddi v. D.R. Hill, Case No. 95-CV-00022 J (AJB), an unpublished order filed May 16, 1996, denying Petitioner's motion for reconsideration.

Naddi v. D. R. Hill, Case No. 96-55755 and Case No. 96-55791, an unpublished opinion filed June 9, 1998, by the Ninth Circuit Court of Appeals affirming the

judgment of the District Court denying the writ of habeas corpus as to all but one of Naddi's claims and granting the writ on the basis of Naddi's claim he was denied his right to self-representation.

Naddi v. D. R. Hill, Case No. 96-55755 and Case No. 96-55791, an order filed July 27, 1998, denying Petitioner's Petition for Rehearing and rejecting the Suggestion for Rehearing En Banc.

## STATEMENT OF JURISDICTION

On June 9, 1998, the Ninth Circuit Court of Appeals issued an unpublished opinion in Naddi v. D.R. Hill, Case No. 96-55755 and Case No. 96-55791, affirming the District Court's partial denial of Naddi's petition for a writ of habeas corpus and granting of the writ on the basis of Naddi's claim he was denied his right to self-representation. On July 29, 1998, the Ninth Circuit Court of Appeals denied Petitioner's petition for rehearing and suggestion for rehearing en banc. This Court has jurisdiction to review the Court of Appeals' opinion pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONS, STATUTES OR REGULATIONS

The Sixth Amendment of the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

> have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .

28 United States Code, § 2254, subdivision (a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

## STATEMENT OF THE CASE

On October 15, 1985, Naddi was charged with five counts of murder with the use of a firearm. Multiple murder as a special circumstance was additionally alleged and the District Attorney sought the death penalty.

On December 20, 1985, Naddi changed his previously entered plea of not guilty to a plea of not guilty by reason of insanity.[1]

On March 17, 1986, criminal proceedings were suspended pursuant to California Penal Code, § 1368 based upon doubt regarding Naddi's mental competency

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1. The evidence of Naddi's guilt was overwhelming. In addition, Naddi confessed on numerous occasions to killing his wife and her four family members. The only issue of consequence in the case was whether Naddi was sane at the time he murdered his wife and four of her relatives.

to stand trial. The trial court thereafter found Naddi incompetent to stand trial and Naddi was sent to a state mental hospital.

Thereafter, the court found Naddi competent to stand trial and criminal proceedings resumed. After criminal proceedings resumed, Naddi was appointed new counsel, at his request. Naddi's new counsel expressed a doubt as to his competency to stand trial and criminal proceedings were again suspended.

On March 10, 1987, a jury found Naddi competent to stand trial. On April 8, 1987, Naddi was granted his right to represent himself, after making a request to do so and criminal proceedings resumed.

Criminal proceedings were suspended a third time based upon doubt regarding Naddi's mental competency to stand trial. At this time, the court reexamined Naddi's waiver of his right to represent himself. After considering expert testimony on the question, the court suspended Naddi's right to self-representation.

On February 11, 1988, a jury found Naddi competent to stand trial.

On June 8, 1988, a jury convicted Naddi of five counts of first degree murder. Multiple murder special circumstances and the special allegations pertaining to firearm use were found to be true.

A subsequent sanity trial resulted in a mistrial when the jury was unable to reach a verdict. A second sanity trial also resulted in a mistrial after a finding by the court that the prosecutor made objectionable comments in closing argument. On September 29, 1989, before the jury for the third sanity trial was empaneled, the court expressed a doubt as to Naddi's competency to stand trial. The court suspended criminal proceedings and the jurors were discharged due to the court finding they would suffer a hardship if asked to continue service. On October 30, 1989, Naddi was found competent to stand trial. The

third sanity trial thereafter began and resulted in a mistrial due to jury misconduct. A fourth sanity trial resulted in a finding that Naddi was sane when he committed all five murders. Throughout the guilt and sanity phase trials, Naddi continued to sporadically request to represent himself. His requests were denied in every instance. By this point, Naddi had been represented by twelve different attorneys, with almost all replaced for the reason that he believed they were in collusion with the prosecution. At times, his delusions included employees working for these attorneys, such as investigators.

Since the District Attorney was seeking the death penalty, the penalty phase of Naddi's trial began next. On July 9, 1990, the jury returned a verdict of life without the possibility of parole. On September 17, 1990, Naddi was sentenced to state prison for life without possibility of parole. Naddi appealed and the California Court of Appeal, Fourth Appellate District, Division One, affirmed the judgment of conviction. On January 7, 1994, the state appellate court held that Naddi was properly denied his right to represent himself as there was "substantial psychiatric evidence showing he lacked that competency." People v. Naddi, Case No. D013123; Appendix at A-26 - A-27.

The California Supreme Court denied Naddi's petition for review and Naddi filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of California (hereinafter "district court"), claiming, inter alia, as he had in state court, that he was denied his right to self-representation at trial, in violation of Faretta v. California, 422 U.S. 806 (1975). On April 29, 1996, the District Court, rejecting Naddi's other claims for relief, granted the writ of habeas corpus on the basis of Naddi's contention he was denied his right to self-representation. Naddi v. Hill, Case Number 95-CV-0022 J (AJB); Appendix at A-38. On May 16, 1996, the district court

denied Petitioner's motion for reconsideration. Naddi v. Hill, Case No. 95-CV-0022 J (AJB); Appendix at A-77.

Both parties appealed to the United States Court of Appeals for the Ninth Circuit and the Court of Appeals affirmed the order of the District Court. The Ninth Circuit held that the District Court correctly granted the writ on the basis that Naddi was denied his right of self-representation. The Ninth Circuit based its decision on the fact that Godinez v. Moran, 509 U.S. 389 (1993) held there is no distinction between competency to stand trial and competency to waive the right to self-representation. The Ninth Circuit concluded that, by implication, Godinez holds that psychiatric evidence should not be considered in making a determination of whether a defendant has actually made a knowing and intelligent waiver of counsel. The Ninth Circuit also held the denial of Naddi's right to self-representation required reversal. Naddi v. Hill, Case Nos. 96-55755 and 96-55791; Appendix at A-82. Both parties filed timely petitions for rehearing and suggestions for rehearing en banc. On July 27, 1998, the Ninth Circuit denied the petitions and rejected the suggestions for rehearing en banc.

## REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari in order to secure uniformity of decision regarding an important and reoccurring issue of constitutional law. Relying on this Court's decision in Godinez v. Moran, 509 U.S. 389 (1993), the Ninth Circuit has concluded that a trial court is precluded from considering psychiatric evidence in determining whether a criminal defendant's waiver of the right to counsel is knowing and voluntary. Naddi v. Hill, Appendix at A-82 - A-83. In contrast, other federal courts have relied on such evidence in evaluating the validity of a defendant's waiver of the right to counsel.

1. **A Trial Court Should be Permitted to Consider Psychiatric Evidence in Determining Whether a Defendant's Waiver of the Right to Counsel is Actually Knowing and Voluntary**

In Godinez, this Court concluded that the competency to waive the right to counsel is not a higher standard of competency than is required to stand trial. Godinez, 509 U.S. at 391. While a defendant who is competent to stand trial is therefore also competent to waive the right to counsel, a trial court's duty of inquiry does not end with a finding of competency to stand trial. The trial court must satisfy itself that the waiver of constitutional rights is also knowing and voluntary. Godinez, 509 U.S. at 400.

As this Court explained:

> [The] focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings. . . . The purpose of the "knowing and voluntary" inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequence of a particular decision and whether the decision is uncoerced. Godinez, 509 U.S. at 401, fn. 12, original emphasis.

The Ninth Circuit's refusal to permit consideration of psychiatric and psychological evidence in determining whether Naddi's waiver of his right to counsel was actually knowing and voluntary is in conflict with the better reasoned approach as taken by the Eighth and the Eleventh Circuits. Both Circuits held a defendant's mental health is an appropriate consideration when a court determines whether a waiver of the right to counsel is knowing and voluntary, even when the court has already found the defendant competent to stand trial. Wilkins v.

Bowersox, 145 F.3d 1006 (8th Cir. 1998); United States v. Cash, 47 F.3d 1083 (11th Cir. 1995).

In this case, Naddi, although competent to stand trial, suffered from a mental defect that went to the very issue of whether he knowingly and voluntarily waived counsel: Naddi believed that any attorney appointed to represent him would not serve him well as that attorney was necessarily in collusion with the district attorney prosecuting the case. The Ninth Circuit, citing to Godinez, concluded that it is not possible for a defendant to be mentally competent to stand trial, and still have any mental defect that is relevant to whether a waiver of the right to counsel is knowing and voluntary. Appendix at A-82; see also, Appendix at A-61 - A-62. Accordingly, the Ninth Circuit reversed the State's judgment because the trial court considered evidence of Naddi's mental defect in evaluating whether his waiver of his right to counsel was in fact knowing and voluntary.

As the Eleventh Circuit has recognized, however, an effective waiver of the right to counsel may depend upon factors which include the defendant's mental health. In Cash, the Eleventh Circuit found that, despite a finding of mental competence to stand trial, the defendant's subsequent waiver of his right to counsel was deficient because the lower court's inquiry failed to sufficiently address the effect defendant's personality disorder (which caused him to "overestimate and overstate his abilities") had on: (1) his understanding of the charges and penalties he faced, and (2) his decision to continue to represent himself despite admonitions from the district court that such a course was unwise. Cash, 47 F.3d at 1090.

Similarly, the Eighth Circuit recently affirmed a district court's grant of habeas relief in a capital case. While the state's finding of competency to stand trial was fully supported by the record, its finding that the defendant had made a knowing, intelligent, and voluntary waiver of the right to counsel was not supported by the

record. Specifically, the district court noted that every psychiatrist and psychologist testifying on the issue concluded that the defendant suffered from a mental disorder that prevented him from actually understanding the significance and consequences of his waiver decision. Wilkins v. Bowersox, 933 F.Supp. 1496, 1508, 1513-1515 (W.D. Mo. 1996); affirmed Wilkins v. Bowersox, 145 F.3d 1006 (8th Cir. 1998). As the Eighth Circuit concluded "the mental health of a defendant is also a relevant consideration in assessing whether a waiver of counsel was knowing, intelligent and voluntary" despite the defendant's mental competency to stand trial. Wilkins, 145 F.3d at 1012.

To properly discharge the trial court's duty to determine if a defendant's waiver of counsel is intelligent, "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." Von Moltke v. Gillon, 332 U.S. 708, 723-724 (1948).

> The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

The approach of the Ninth Circuit fails to permit due consideration of relevant and admissible evidence in conformity with this Court's holdings in Johnson and Von Moltke.

The different approaches by federal courts in making determinations regarding the knowing and voluntary waiver of the right to counsel as it relates to evidence of a mental defect supports a grant of certiorari in this case. Rule 10, subd. (a)(c), Rules of the Supreme Court of the United States. The clear resolution of this issue is important in order to ensure that trial courts are permitted to consider all relevant and admissible evidence

so as to facilitate true and accurate determinations of the question of whether a criminal defendant's waiver of the right to counsel is in fact knowing and voluntary.

## II. The Erroneous Denial of a Defendant's Right to Self-Representation Should Not Compel Retrial in Every Instance

Even assuming an error in denying a request for self-representation, the error should be subject to a harmless error analysis. No persuasive rationale has ever been put forth to explain why a reversible per se rule applies when a criminal defendant is erroneously precluded from self-representation. This Court has not resolved the question of whether an erroneous denial of a defendant's right to self-representation can ever be viewed as harmless error. See, Faretta v. California, 422 U.S. 806 (1975). This Court has assumed that the right is not subject to harmless error analysis in dictum subsequent to Faretta. McKaskle v. Wiggins, 465 U.S. 168, 177, n. 8 (1984); see also, Arizona v. Fulminante, 499 U.S. 279, 310 (1991). The Ninth Circuit has agreed with the dictum in its express statements on the issue. United States v. Arlt, 41 F.3d 516, 524 (9th Cir. 1994). As Naddi's case aptly illustrates, it is incongruous to suggest that representation by competent counsel necessarily prejudices a defendant and compels a retrial.

The anomaly of retrying a criminal defendant because he was prejudiced by being compelled to be defended by competent counsel is particularly evident in Naddi's case. The evidence of Naddi's guilt was overwhelming. Indeed, Naddi had confessed on numerous occasions to killing his wife and four of her family members. The only issue of consequence in the case was whether Naddi was sane at the time he committed the murders. During the protracted state proceedings, which included four competency trials and four sanity trials,

Naddi was represented by 12 different attorneys. Having avoided the death penalty for his crimes, Naddi was hardly prejudiced by the capable representation afforded him during the years of litigation in the state trial court.

The Ninth Circuit also erred in refusing to remand the case in order to permit the state trial court to apply the appropriate legal standard in light of this Court's holding in Godinez in determining whether Naddi's waiver of his right to counsel was knowing and voluntary.[2/] The Ninth Circuit concluded that there was no basis for a remand since there had been a ruling that Naddi was entitled to represent himself earlier in the proceedings. The difficulty with the Ninth Circuit's reliance on that earlier determination is the fact that it did not take into account intervening circumstances in the case. As this Court has held, such a determination must be based on the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. Johnson, 304 U.S. at 464. Naddi's changing circumstances should not be ignored by relying upon an earlier ruling. That is particularly true where, as here, a defendant's mental competency to stand trial was litigated on four occasions, resulting in his being sent to a state mental institution on one occasion. If the state court applied the incorrect standard, it should be given an opportunity to apply the correct standard before the burdens of a retrial are automatically imposed upon the state.

Moreover, before remanding the matter to the state trial court for a determination under the appropriate standard, a federal court should condition any retrial upon the defendant actually representing himself. In other words, if the state trial court concludes that Naddi was entitled to self-representation under the applicable

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2. When the trial court made its determination, this Court had not yet issued its decision in Godinez.

standard, then Naddi must represent himself in any retrial. If Naddi declines to represent himself, the state court should be permitted to automatically reinstate the judgment of conviction. Otherwise, a criminal defendant is simply being accorded an untenable windfall which squanders limited state judicial and prosecutorial resources. There can be no justification for a criminal defendant being afforded a second bite of the apple with benefit of counsel because he was erroneously denied the right to represent himself.

Accordingly, Petitioner also urges this Court to grant certiorari to determine whether the erroneous denial of the right of self-representation compels a retrial in every instance.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated: August 26, 1998.

Respectfully submitted,

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